

Chapter 7

Post-Briefing

Step 9. Asking for oral argument

The court hears oral argument after all the briefs have been filed. Argument is generally held in the second full week of the month, before a panel of three justices. The court writes the parties asking who wishes to argue the case orally. In the Fourth Appellate District, Division One, 15 minutes for each side is the maximum time for argument, although the court, on written request (by motion), may give more time. If argument is requested, the court will notify you of the date and time at least 20 days in advance. (CRC rule 23(b).) You should let the court know right away if you cannot attend court on the date given.

The fact that you orally argue a case does not affect the length of time it will be before you get your decision. Cases, whether argued or not, are randomly “put on calendar” (assigned to a justice to work on) in order of the dates on which their briefings were completed.

How do you prepare for oral argument? You need to review all of the items you have cited in your brief to make sure nothing has been overruled and that there is no new authority that might be helpful to your case. If you do have new authority, you should let the court and opposing counsel know what it is in writing before the argument. This is most important if you intend to argue the new material at argument. If it is sufficiently in advance of oral argument, you may wish to ask the court for leave so that you and opposing counsel can file supplemental letter briefs concerning the new authorities before the matter is heard.

You should review the record and the arguments in the brief so that you are very familiar with your case in the event one or more of the justices asks you questions about the case. Make an outline of the points you wish to emphasize and the responses you would make to possible questions that might be raised by the court or arguments that might be raised by opposing counsel. You should not prepare a written statement to read since you may be interrupted with questions from the justices. Be prepared to be flexible.

If at all possible you should take the time to view at least some of an oral argument calendar in advance of your argument date. Generally oral argument is held the second week of the month. However, you should call the clerk's office in advance to confirm the date you wish to come since you may have selected a morning or afternoon when no calendar is scheduled. Argument is open to the public.

What will happen in court? When you arrive for oral argument you will check in with the court clerk, giving your name and a revised time estimate. The amount of

time per side may not exceed 15 minutes unless the court has granted leave for more time in advance of argument. You will go through a metal detector before entering the courtroom. Once in the courtroom, sit in the audience until your case is called. When the justices enter the courtroom all persons rise. The presiding justice or the most senior justice sits in the middle and calls the calendar. Generally, but not always, the cases are heard in order with the cases taking the shortest time going first.

When your case is called, proceed through the gates to the podium area. The appellant sits at the table to the left of the podium and the respondent sits at the table to the right of the podium. The appellant argues first. If you are the appellant and wish to reserve part of your argument time to respond to or rebut the respondent's argument, tell the justices that before you start your argument. Be aware that the justices generally will call time when you have used up your announced time and when that occurs you should do no more than complete the sentence you are speaking. If you are the appellant and have requested time for rebuttal you are limited in the rebuttal to talking about only those arguments which the respondent has used. You may not present any new arguments at that time.

What do you say at oral argument? Often counsel will begin with the words "may it please the court." Whether you start with that or not, you should identify yourself saying that you are self-represented. By the time of oral argument, the three justices on the panel who hear your case are familiar with the facts of your case, the arguments you have raised and the law involved. Thus, there is no need for you to repeat anything that you have already told the court in your briefs. If you do not have anything to present other than what is in your briefs you should seriously consider not presenting any oral argument.

If, however, you have decided to argue orally, you should proceed, after identifying yourself, in a conversational tone limiting your comments to things which happened during the trial that you believe were error and that are part of your appeal. During your remarks one or more of the justices may pose questions to you. If so, stop what you are saying and answer the question. If you do not know the answer to the question, just say so.

How soon is there a decision? After all the briefs have been filed and oral argument, if requested, has been held, the case is "submitted." Cases that were assigned to that same particular month with no oral argument requested are all submitted at the same time as the cases that were argued. After the case is submitted, the court does not accept any further information about the case. (CRC rule 23(d).) The justices on the panel discuss the case, and decide what they think is the correct disposition. A decision is then filed within 90 days after the end of the month in which the case is submitted.

Step 10. Petitioning for rehearing

After the opinion in the appeal is filed, you may file a *Petition for Rehearing* ([Sample Form S](#)) in the Court of Appeal. There is an automatic right to rehearing if the Court of Appeal makes a decision based on an issue that was not proposed or briefed by any party. (Government Code section 68081.) One does not need to petition for rehearing before seeking review in the Supreme Court. However, as a policy, the Supreme Court accepts the statement of facts and issues as set out in the Court of Appeal opinion unless any alleged omission or misstatement of fact was brought to the Court of Appeal's attention by petition for rehearing. (CRC rule 28(c).)

How soon does the *Petition for Rehearing* need to be filed? The *Petition for Rehearing* must be served and filed within 15 days of the filing of the opinion, the order for publication, or the modification of the opinion if it changes the judgment. No opposition to the petition may be filed unless requested by the court. If no ruling, or order for publication or modification that changes the judgment, has been made within 30 days of the decision, the petition will be deemed denied. (CRC rule 25(b).)

What goes into the petition? The petition should not merely repeat information and argument that was covered by the appeal. Instead, it should focus on specific errors or contradictions in the opinion.

Normally the court does not consider points or issues being raised for the first time on rehearing, with two exceptions: when the superior court or the Court of Appeal did not have the power (jurisdiction) to handle the case, and when the Court of Appeal, in an exercise of its discretion, agrees to consider new materials (such as a new case) that were not included earlier.

Generally, the petition for rehearing should be directed at errors in the opinion: a major misstatement of fact, an error of law, major law or facts that were left out, and/or an important argument that was not included.

The original and four copies should be filed with the Court of Appeal along with *Proof of Service* ([Sample Form C](#)) on all parties; one copy should go to the superior court, and five copies to the Supreme Court. (CRC rules 15(c) & 44(b)(2)(A).)

The Court of Appeal has jurisdiction (power to make rulings in the case) for 30 days from the date the opinion was filed *or* a request for publication was granted *or* an opinion was modified that changed the judgment. (CRC rule 24(b), 25(b).)

Step 11. Review in the California Supreme Court

The Court of Appeal's decision becomes final in the Court of Appeal 30 days after the filing of its opinion or the grant of publication or modification of the opinion with a change in judgment. A petition for review in the California Supreme Court must be filed within 10 calendar days, which start the day after the 30th day whether the court is open or not. Thus, if the Court of Appeal's decision becomes final on a Friday, Saturday and Sunday are days 1 and 2 of this 10-day period during which the petition for review must be filed. (CRC rules 24(b), 28(e).)

At the beginning of the petition there should be a short statement of the issues to be presented, with a statement why this case is one the Supreme Court should take for review. (CRC rule 28.1(b).) If produced on a computer, the petition may not exceed 8,400 words or 30 pages if typewritten. The maximum length does not include exhibits and the copy of the Court of Appeal opinion that must be included. (CRC rule 28.1(b)(e).) An original and 13 copies must be filed in the Supreme Court. (CRC rule 44(b).) A copy must be served on the clerk of the Court of Appeal making the decision, on each party, and on the clerk of the superior court. An answer is not required unless the party opposing review wants to add an issue. If filed, an answer should be filed within 20 days after the petition is filed. (CRC rules 28(a)(2), (e)(4), (f).)

If the Supreme Court grants review, it may put off action while awaiting disposition of another case, or specify issues that are to be briefed. (CRC rules 28.2(c), 29(a).) Within 30 days the petitioner must file an opening brief or the brief filed in the Court of Appeal. The opposing party then has 30 days to file an answer or a copy of the brief filed in the Court of Appeal. A reply brief, if filed, is due within 20 days. (CRC rule 29.1(a).)

The Court of Appeal in San Diego accepts Supreme Court *filings* and forwards them to the Supreme Court on a daily basis. Please note that the Court of Appeal can transmit only Supreme Court *filings*. When you file your brief in the Court of Appeal, you must serve five additional copies of your brief (also known as "service copies") on the Supreme Court. You must submit these briefs directly to the Supreme Court. For further information concerning the Supreme Court, call 213-830-7570 (Los Angeles) or 415-865-7000 (San Francisco).

Step 12. Issuance of the remittitur

This is the end of the case. The remittitur is a document that says the review of the case is final and transfers the power of the reviewing courts (Court of Appeal and Supreme Court) back to the superior court so the superior court can follow up on

what, if anything, still needs to be done to carry out the decision or decisions made by the reviewing courts. (CRC rule 26.)

If no petition for review was filed in the Supreme Court, the remittitur is issued 61 days after the filing of the opinion in the Court of Appeal (unless a request for publication was granted or there was a modification of the opinion resulting in a change in the judgment, in which cases the time is more than 61 days). At that time the case becomes “final” in the reviewing courts. (CRC rules 24(b), 26(b), 28.2(c).) If a party is entitled to costs, the memorandum of costs must be filed in superior court within 40 days of the mailing of a copy of the remittitur. (CRC rule 27(d).)